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No. 188

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1989

COLORADO INTERSTATE GAS COMPANY, et al.,
Petitioners,
vs.

OKLAHOMA TAX COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OKLAHOMA

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July 31, 1989

QUESTIONS PRESENTED

OKLA. STAT. tit. 68 §§1107-1111 and OKLA. STAT. tit. 68 §2357D were enacted pursuant to the publicly stated intent of the Oklahoma Governor and legislature to impose a new tax on natural gas which would be paid by out-of-state consumers of such gas. As a result of a series of exemptions and credits, the tax, in practical operation, is imposed on purchasers of cheap gas (gas selling for less than \$1.00). Because of federal price controls which preceded enactment of the Oklahoma tax, substantially all gas selling for less than \$1.00 is purchased in interstate commerce by interstate pipeline companies for resale to consumers outside Oklahoma.

The questions presented are:

1. Whether the Oklahoma Conservation Excise Tax is unconstitutional under the Commerce Clause of the Constitution of the United States, as the tax discriminates against interstate commerce in favor of local interests, is not reasonably apportioned, and is not reasonably related to the services provided by the state of Oklahoma.

2. Whether the Oklahoma Conservation Excise Tax is unconstitutional under the Supremacy Clause of the Constitution of the United States, as it interferes with federal regulation of the transportation and sale of natural gas in interstate commerce under the Natural Gas Act and the Natural Gas Policy Act of 1978.

THE PARTIES

Petitioners:

Colorado Interstate Gas Company
El Paso Natural Gas Company
KN Energy, Inc.
ANR Pipeline Company
Natural Gas Pipeline Company of America
Northern Natural Gas Company
Panhandle Eastern Pipeline Company
Transwestern Pipeline Company

Cities Service Gas Company, whose name was changed to Williams Natural Gas Company, was a plaintiff below but has elected not to appeal the decision of the Supreme Court of the State of Oklahoma.

The Petitioners' parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates are listed in the Appendix hereto at page App. 1, *infra*.

Respondent:

Oklahoma Tax Commission

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No. _____

In The
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COLORADO INTERSTATE GAS COMPANY, et al.,
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vs.

OKLAHOMA TAX COMMISSION,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OKLAHOMA**

The Petitioners respectfully pray that a Writ of Certiorari issue to review a judgment of the Supreme Court of the State of Oklahoma entered May 2, 1989. Notice of Appeal was filed in the Supreme Court of Oklahoma on July 26, 1989.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Oklahoma is reported at 60 OBJ 1128, and is reprinted in the Appendix hereto, p. App. 6, *infra*.

The memorandum decision of the District Court of Oklahoma County, Oklahoma has not been reported. It is reprinted in the Appendix hereto, p. App. 24, *infra*.

JURISDICTION

The judgment of the Supreme Court of the State of Oklahoma was entered May 2, 1989. No petition for rehearing was sought. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a). Notice of Appeal to this court was filed July 26, 1989 with the Oklahoma Supreme Court. Such notice is reprinted in the Appendix hereto, p. App. 46, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 3, of the United States Constitution, provides, in pertinent part, that:

"The Congress shall have Power to regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes."

Article VI, Clause 2, of the Constitution of the United States provides, in pertinent part, that:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding. . . ."

The pertinent statutory provisions of the Natural Gas Act (15 U.S.C. §717 et seq.) and the Natural Gas Policy Act of 1978 (15 U.S.C. §3301 et seq.) are set forth in full in the Appendix hereto, p. App. 36, *infra*.

The Conservation Excise Tax (OKLA. STAT., tit. 68 §§1107-1111) and the Tax Credit Act (OKLA. STAT., tit. 68 §2357-D) are set forth in full in the Appendix hereto, p. App. 38, *infra*.

STATEMENT OF THE CASE

This case began in 1977 at a breakfast meeting at the Oklahoma governor's mansion attended by the then governor, the majority leader of the House of Representatives of Oklahoma, the Speaker of the House, the President Pro-Tem of the Senate of the State of Oklahoma, the majority leader of the Senate, and an economist and expert in oil and gas matters, Dr. William Talley, II¹. The governor and the legislative leaders were interested in enacting a new tax law which would raise additional taxes for the State of Oklahoma but which would be paid primarily by out of state consumers of natural gas and not by Oklahomans. Dr. Talley was invited for his expert advice on how this could be achieved.

Dr. Talley explained to the governor and the legislative leaders that at that time (1977) there were approximately 13.5 trillion cubic feet (tcf) of gas reserves in Oklahoma under contract, and of that 13.5 tcf, 7.5 were

¹ Dr. Talley was a witness in the trial below.

committed to interstate purchasers and 6.0 to intrastate purchasers. Because of federal price controls, 80% of the 7.5 tcf committed to the interstate market was priced at 30¢ per thousand cubic feet (mcf) or less and, under the regulations, would not escalate to a price of \$1.00 or more in the foreseeable future. Of the 6 tcf committed to the intrastate market, only 30% was priced below \$1.00 per mcf. Of the 1.8 tcf (6 tcf x 30%) of gas selling in the intrastate market for less than \$1.00, it was then known that one-half of such gas would escalate in price to above \$1.00 by 1979 or 1980.

There was then and is now an Oklahoma Gross Production Tax which imposes a 7% severance tax on gas produced in Oklahoma. This percentage tax applies to all gas and, of course, less gross production tax is paid on cheaper gas. Dr. Talley explained to the breakfast meeting that if a new tax could be devised which applied only to gas selling for less than \$1.00, substantially all of the new tax would fall on gas contracted to interstate purchasers. Dr. Talley also explained that substantially all of the interstate gas contracts had tax reimbursement clauses whereby the gas purchaser agreed to reimburse the producer for any severance taxes. The tax so absorbed was then passed through in the rate charged the consumer. Thus, in practical operation, a new tax on gas selling for less than \$1.00 would be paid principally by interstate purchasers and passed on to out-of-state consumers.

The governor and the legislature was nevertheless concerned about imposing any new severance tax on the producers and royalty owners in Oklahoma as the gross production tax had only recently been increased from 5% to 7% and had resulted in a "political blood bath".

Although only a small number of the producers and royalty owners would have to pay the new tax because of the tax reimbursement clauses in their gas sales contracts, Dr. Talley explained that even this problem could be avoided by enacting a new income tax credit in favor of producers and royalty owners who might have to pay the new tax.

The opportunity to raise new taxes which would be paid by out of staters and not by their own constituents was too attractive to be turned down, and the legislative leaders set out to enact the necessary laws.

The majority leadership immediately encountered a problem with the minority party in the House of Representatives. The minority were opposed to any new taxes. The majority leadership called a meeting with the minority leadership and explained that they were drafting the new tax law in such a way that the tax "would fall on the people outside the state". They explained that while the new tax ostensibly fell on the producers and royalty owners, the royalty owners and producers would not pay the tax because separate legislation was proposed creating a new income tax credit to such royalty owners and producers in an amount exactly equal to any severance taxes which they might be required to pay. When queried by the minority as to why the new gas tax and income tax credit were not included in the same bill, the leadership explained that they were concerned about the constitutionality of the bills in the event they were enacted together.

On May 9, 1977 the income tax credit bill (now OKLA. STAT., tit. 68 §2357-D) was introduced and

adopted. When questioned by other members of the legislature as to why they were being asked to enact an income tax credit for a Conservation Excise Tax which had not yet been enacted into law, the Senator proposing the income tax credit bill explained that they were enacting the income tax credit bill first as an "insurance policy" to ensure to the Oklahoma producers and royalty owners that when the Conservation Excise Tax was subsequently enacted they should have no fear that they would have to pay any of the tax. Seventeen days later, on May 26, 1977, the Conservation Excise Tax (OKLA. STAT., tit. 68 §§1107-1111) was enacted.

The Conservation Excise Tax levies a tax of 7¢ per mcf, less any gross production tax paid on the same gas. For example, on the sale of gas for \$1.00 per mcf there is imposed a 7¢ Conservation Excise Tax less 7¢ of gross production tax (7% of \$1.00 equals 7¢). The Conservation Excise Tax, then, applies only to gas selling for less than \$1.00 per mcf. Dr. Talley's recommendation that a new tax be imposed upon cheap gas selling for less than \$1.00 was achieved.

The income tax credit provides that if, under the terms of a gas purchase contract between a producer and a purchaser, the purchaser has *not* agreed to reimburse the producer for his tax liability, the producer is granted an income tax credit equal to the full amount of any Conservation Excise Tax which he may be required to pay. If the tax credit exceeds the income tax liability of the producer, then the producer is entitled to a refund. If, on the other hand, the purchaser has agreed to reimburse the producer for the Conservation Excise Tax, no tax credit is allowed to the producer. The purchaser is not

entitled to a tax credit in any event. No producer or royalty owner pays any Conservation Excise Tax because he is either reimbursed by the purchaser under the terms of the contract or is granted an income tax credit.

The Petitioners here are interstate purchasers of Oklahoma natural gas who, along with other interstate purchasers, were the targets of the Oklahoma legislature when it enacted the Conservation Excise Tax. Pursuant to the procedure provided in the Oklahoma taxing statutes, the Petitioners have paid the Conservation Excise Tax under protest for the period of January 1, 1978 (its effective date) to the present, and filed this action in the Oklahoma County District Court for a refund of such taxes.

Through June, 1987, the Petitioners have paid in excess of \$49 million in Conservation Excise Taxes. The total amount of Conservation excise Tax paid by all purchasers during the same period exceeds \$100 million.

Following an evidentiary hearing before the Oklahoma County District Court wherein all of the above facts were presented and the constitutional questions above presented were argued orally and by written brief, such court entered judgment against the Petitioners and in favor of the Respondent. That judgment was appealed to the Supreme Court of Oklahoma, which affirmed the judgment of the trial court on May 2, 1989.

Both the trial court and the Oklahoma Supreme Court completely disregarded the legislative intent to discriminate against interstate commerce and the fact that the Conservation Excise Tax, in practical operation, works discrimination against interstate commerce. Rather, both

courts relied upon the Oklahoma legislature's self-serving and deceitful statement in the preamble to the Conservation Excise Tax act, which provides that it is the legislative intent to levy a tax on the "severance" of natural gas. However, producers and royalty owners are totally shielded from the tax by the income tax credit previously passed as the so-called "insurance policy" enactment. Since the tax cannot impact the production phase, the two Oklahoma acts, taken together, in their application impose a tax on the purchase of Oklahoma gas rather than upon "severance". Concluding that the tax is a mere severance tax, both the trial court and the Oklahoma Supreme Court found the tax to be indistinguishable from the Montana severance tax which was upheld in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981).

Petitioners urged below, and urge here, that Oklahoma's Conservation Excise Tax is indistinguishable from the Louisiana First Use Tax which was struck down in *Maryland v. Louisiana*, 451 U.S. 725 (1981). The Oklahoma Supreme Court distinguished *Maryland v. Louisiana* on the simple ground that the gas being taxed in Louisiana, unlike the gas being taxed in Oklahoma, had not been produced, or severed, in Louisiana.

REASONS FOR GRANTING THE WRIT

I.

The Oklahoma Supreme Court's ruling conflicts with decisions of this Court.

The Oklahoma Supreme Court's decision directly conflicts with this Court's ruling in *Maryland v. Louisiana*, 451 U.S. 725 (1981). *Maryland v. Louisiana* held that Louisiana's First Use Tax was unconstitutional under the Commerce Clause, as the tax discriminated against interstate commerce in favor of local interests, and under the Supremacy Clause, as it interferes with federal regulation.

Louisiana imposed a tax of seven cents per mcf on the "first use" of any gas imported from the Outer Continental Shelf into Louisiana. Eighty-five percent of such gas was owned by interstate pipeline companies who paid the tax and passed it on to consumers out of state. The remaining fifteen percent was owned by producers. The tax imposed was precisely equal to Louisiana's gross production tax which is imposed on Louisiana's gas producers. The tax package enacted by the Louisiana legislature contained a number of exemptions from and credits for the First Use Tax. A severance tax credit provided that any taxpayer subject to the First Use Tax was entitled to a direct tax credit on Louisiana gross production taxes. Thus Louisiana producers, in practical operation, were exempt from the tax. Other local interests were also granted exemptions and credits. As a result of such exemptions and credits, Louisiana consumers for the most part were not burdened by the tax but it did uniformly apply to gas moving out of the State.

This Court held that the First Use Tax unquestionably discriminated against interstate commerce in favor of local interests as the necessary result of the tax credits and exclusions, and that quantification of such discrimination was unnecessary.

Oklahoma's Conservation Excise Tax is identical in nature to Louisiana's First Use Tax. Both allow credits against severance taxes. Both allow credits exempting local producers from the tax. In sum, both were designed to and do exempt local interests and pass the tax on to out of state consumers.

The Oklahoma Supreme Court's reason for distinguishing *Maryland v. Louisiana* is erroneous. The Oklahoma Supreme Court distinguished *Maryland v. Louisiana* on the ground that the Louisiana tax was imposed on gas which had not been produced, or severed, in Louisiana. Thus the tax was not a compensatory tax, compensating Louisiana for the severance of resources from its soil. But, the Oklahoma Supreme Court ignores the language in *Maryland v. Louisiana*, at 759, that even compensatory taxes are unconstitutional unless there is equality of treatment between local and interstate commerce.

Likewise, the Oklahoma Supreme Court's reliance on *Commonwealth Edison Co. v. Montana*, *supra*, is misplaced. The Montana tax was a straight-forward severance tax which was not packaged with a series of exemptions and credits favoring local interest. Further, the Montana tax was a percentage tax which applied to coal of all prices, not a flat rate tax like the Oklahoma tax which is designed to apply only to low priced gas under contract to interstate purchasers.

The Oklahoma Supreme Court's ruling is also in conflict with this court's ruling in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954). *Michigan-Wisconsin* held that a Texas tax on the occupation of "gathering gas" was unconstitutional because, as it was a tax on the privilege of purchasing gas, it presented a potential for multiple taxation. This Court also held that the measure of the tax was not reasonably related to the extent of the contact of the interstate purchasers with the State of Texas.

Although *Michigan-Wisconsin* was decided before *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), its Commerce Clause analysis is still valid in determining whether or not a state tax satisfies the second and fourth prongs of the modern test set forth in *Complete Auto*.

Michigan-Wisconsin held that if Texas may impose a tax on the privilege of purchasing gas for flow in interstate commerce then the recipient states have at least equal right to tax the "unloading" from the pipeline of the same gas when it arrives for distribution. Likewise, states through which the gas is transported might tax the privilege of transporting the gas through their boundaries. This potential of multiple taxation makes the tax fail to meet the second prong of the *Complete Auto* test in that it is not fairly apportioned.

The Texas gas flowed steadily and continuously from the delivery point at the wells through the many states in which the interstate pipeline companies' facilities were located. *Michigan-Wisconsin* held that as a basis for finding a separate local activity, the incidence of the tax must be a more substantial factor than the movement of the gas

from a local outlet into an interstate pipeline. Under modern Commerce Clause analysis, the Texas law did not meet the fourth prong of the *Complete Auto* test in that it was not fairly related to services provided by the state.

Oklahoma's Conservation Excise Tax is, in practical operation, identical to Texas' "gathering tax". Both are taxes on the privilege of purchasing gas. Because of the exemptions and credits in Oklahoma, no producer or royalty owner must pay one penny of the tax. Only purchasers pay the tax. As in *Michigan-Wisconsin*, as expressly found by the trial court, the gas which Petitioners purchase in Oklahoma flows steadily and continuously from the wellheads into Petitioners' interstate pipelines and out of Oklahoma to other states. If Oklahoma can tax the privilege of purchasing the gas, other states can tax other aspects of the transportation and delivery of the gas.

The Oklahoma Supreme Court distinguishes *Michigan-Wisconsin* by finding that the Oklahoma tax is a "severance" tax. Since severance can occur in only one state, the Supreme Court of Oklahoma concludes that there is no risk of multiple taxation. The Oklahoma Supreme Court erroneously relied on the legislature's naked statement that it was imposing a "severance" tax and ignored the practical incidence of the tax, i.e. the privilege of purchasing gas.

The decision disposes of the fourth prong of the *Complete Auto* test by concluding that Oklahoma provides a wide range of benefits to the Petitioners. There was no evidence in the record to support such a conclusion. As

this Court recognized in *Maryland v. Louisiana* and reaffirmed in *American Trucking Associations, Inc. v. Scheiner*, ___ U.S. ___, 107 S. Ct. 2829 (1987), a state tax must be assessed in light of its actual effect considered in conjunction with other provisions of a state's tax scheme.

II.

The issues in this case are significant and important not only to the Petitioners but also to consumers of gas throughout the nation.

Petitioners have paid in excess of \$49 million in Conservation Excise Taxes from enactment of the tax in 1977 through June of 1987. The total tax paid by all purchasers during that period exceeds \$100 million. Most of this tax has been passed on to consumers in virtually every state in the nation.

Oklahoma is one of several states which produce natural gas which is consumed by the residents of all the other states. Oklahoma's legislators openly expressed their desire to discriminate against persons from out of state in favor of local interests. There is no reason to believe that this attitude has changed nor that legislators in the other gas producing states may not share the same attitude. If Oklahoma can package a set of tax statutes to achieve such discrimination, others will be encouraged to do the same.

It is important that this Court review the decision of the Oklahoma Supreme Court. Equality of treatment

between local and interstate commerce is crucial to the country's economic well being.

CONCLUSION

For these various reasons, the petition for certiorari should be granted.

Respectfully submitted,

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July 31, 1989

APPENDIX



App. 1

List of Parties

Colorado Interstate Gas Company

The Coastal Corporation, Colorado Interstate Corporation and ANR Pipeline Company

El Paso Natural Gas Company

BR Leasing Inc., BR Services, Inc., Burlington Northern International Services Inc., Burlington Northern Trading Company Inc., Burlington Resources Foundation, Colt Intermodal Inc., Glacier Insurance Ltd., New Mexico and Arizona Land Company, NZ Development Corporation, NZ Properties, Inc., NZU, Inc., Plum Creek Timber Company, Inc., Glacier Park Company, Burlington Northern Railroad Properties, Inc., Burlington Environmental Inc., Chemical Processors, Inc., Clark Land Royalty, Inc., The Denver Union Terminal Railway Company, Glacier Park Boulder Company, Glacier Park Denver Company, Glacier Park Gateway Company, Glacier Park King Street Company, Glacier Park Liquidating Company, Glacier Park Napperville Company, Glacier Park Northwest Company, Glacier Park Orillia Company, Glacier Park Riverpoint Company, Glacier Park Wayzata Company, Heritage Glacier Park Company, Kalispell Glacier Park Company, Tennessee Glacier Park Company, MDF Technology, Inc., Meridian Minerals Company, Meridian Aggregates Company, Meridian Gold Company, Meridian Industrial Minerals Company, Meridian Minerals International Company, Saxony Corporation, Plum Creek Foreign Sales Corporation, Plum Creek Remanufacturing, Inc., Research Applications Inc, The El Paso Company, El Paso Natural Gas Company, El Paso Development Company, Ex-Mission Ranches, Inc., El Paso Mojave Pipeline Co., El Paso Production Company, Meridian Oil Hydrocarbons Inc., Meridian Oil Frontera Inc., Meridian Oil Transportation Inc., Meridian Oil Storage Inc., Odessa Natural Gasoline Co., Odessa Pipeline Company, Pecos Company, Meridian Oil

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Holding Inc., Meridian Oil Inc., Butte Pipe Line Company, Meridian Oil Trading Inc., Northern Rockies Pipe Line Co., Portal Pipe Line Company, Portal II Company, Southland Royalty Company, Southland Gathering Company, Southland Pipeline Company, SRC Production Company, SRC Realty Company, Meridian Oil Production Inc., Meridian Oil Gathering Inc., Meridian Oil Marketing Inc Meridian Oil Services Inc., El Paso Power Development Company (Shell Corporation)

KN Energy, Inc.

None

ANR Pipeline Company

American Natural Resources Company, The Coastal Corporation, ANR Eastern Pipeline Company, American Natural Offshore Company and ANR Southern Pipeline Company, Colorado Interstate Corporation and Colorado Interstate Gas Company

Natural Gas Pipeline Company of America

United Energy Resources, Inc., MidCon Corp., Occidental Petroleum Corporation, Church & Dwight Co., Inc., Energy America Incorporated IBP, Inc., IBP International, Inc., Sheridan Enterprises, Inc., Carbocloro S.A. Industrias Quimicas, Sanital Comercio e Empreendimentos Ltda., Ftaliquimica S.A., Malharia Industrial do Nordeste S.A., Vinor Vinilicos do Nordeste Ltda., Industria Oxy S.A. de C.V., Sumitomo Durez Co., Ltd., Diamond Shamrock Chemicals Company Pty. Limited, Canadian Occidental Petroleum Ltd., International Ore & Fertilizer Belgium, S.A., International Ore & Fertilizer S.p.A., Industria Quimica de Portuguesa, S.A., Mississippi Chemical Corporation, Tororo Industrial Chemicals and Fertilizers Limited, Occidental Chemical China Limited, Occidental Chemical Far East Limited, Occidental Chemical Chile S.A.I., Thai Occidental Chemical Ltd., Thai

App. 3

Diamond Shamrock Ltd., Trans-Jeff Chemical Corporation, Oxy Metal Industries (France) S.A., OXY-TECH Systems, Inc., Plastiflex, C.A., Island Creek of China Coal Ltd., O-K Investment Company Ltd., Minera Azteca, S.A. de C.V., Occidental Minerals (Philippines), Inc., C-D Development Corporation, Newco Holding Corporation, Citco Amazonas Petroleo Ltda., Cico Barreirinhas Petroleo do Brasil Ltda., Citco Rio Petroleo Ltda., Citco Union Texas Petroleo do Brasil Ltda., East Texas Salt Water Disposal Company, Dixie Pipeline Company, Repsol Occidental Corporation, 602 Operating Corporation, Hispano Inversion, S.A., Occidental de Espana, S.A., Oil Casualty Insurance, Ltd., Oil Insurance Limited, Petway Products Distributors, Inc., Excel de Mexico, S.A. de C.V., Hybrid Rice, Inc., RAMM Hybrids, Inc., RAMM Hybrids International, Inc., Carter Day Industries, Inc., and Eko Hotels Limited

Panhandle Eastern Pipeline Company

Panhandle Eastern Corporation

Northern Natural Gas Company

A division of Enron Corp. (list of subsidiaries and affiliates below)

Transwestern Pipeline Company

Parent is Enron Corp. whose subsidiaries and divisions are: Ajax Corporation, The Apollo Group, Inc., Belco Petroleum Corporation (Delaware), Belco Petroleum International, Ltd., Belco Petroleum Latin American, S.A., Belco Petroleum Corporation of Peru, Belco Petroleum of Israel, Ltd., Sonneborn Associates Petroleum Corporation, Belcoal Inc., Enron Americas, Inc., Enron Peru, Inc., Enron Arctic Gas Company, Enron Art Roundation, Enron Capital Corp., Enron Coal Company, Enron Coal Pipeline Company, Enron Data Processing Company, Enron Foundation - Houston, Enron Foundation - Omaha, Enron Gas Gathering, Inc., Enron Natural Gas Gathering Co.,

App. 4

Enron Gas Marketing, Inc., Enron Gas Processing Company, Enron Gas Production Company, Enron Gas Services Company, Enron Gas Supply Company, Enron Gas Transportation Company, Enron Helium Company, Enron Holdings, Inc., Enron International Incorporated, Enron Gas Liquids International (U.K.), Ltd., Enron Gas Liquids France S.A.R.L., NLFI (Far East) Trading Private Limited, IPI Orient LTD., Enron Oil Corp., Enron Oil Ltd., Enron Oil PTE Ltd., The Protane Corporation, Citadel Corporation Limited, Citadel Venezolana S.A., Industrial Gases Limited, Manufacturera de Aparatos Domesticos, S.A., Industrias Ventana, S.A., Industrial Lacarda, S.A., Servicios Consolidados Ventana, S.A., Servicios Vengas, S.A., Transporte Mil Ruedas, S.A., Vengas de Caracas, Vengas del Centro, S.A., Vengas de Occidente, S.A., Vengas de Oriente, S.A., ProCaribe, Inc., ProCaribe Division of the Protane Corporation, Progasco, Inc., Enron Gas Liquids, Inc., Weddell Corporation, Enron Liquids Pipeline Company, Enron Minerals Company, Enron Mobile Bay, Inc., Enron Oil & Gas Company, Enron Exploration Company, Enron Oil Egypt Inc., Enron Oil Syria Inc., Enron Oil & Gas Marketing, Inc., Enron Oil Malaysia Inc., IN Holdings, Inc., Enron Oil Canada, Ltd., Enron Oil Trading & Transportation Company, Enron Oil Pipeline Company, Enron Oil Trading & Transportation Canada Ltd., Webster Transportation Company, Inc., Enron Overthrust Pipeline Company, Enron Power Corp., Enron Power Enterprise Corp., Enron Trailblazer Pipeline Company, Houston Pipe Line Company, The Bermuda Company Gulf Company Ltd., Black Marlin Pipeline Company, Coal Properties Corporation, Comanche Marketing, Inc., Cora Dock Corporation, Enron Clearing House Company, Enron Co-Gen Fuels Company, Enron Gas Pipeline Operating Company, Enron Industrial Natural Gas Company, Enron Interstate Pipeline Company, Enron Mojave, Inc., Enron Texoma Gas Company, HNG Capital Corp., HNG Holdings Corp., IDT Gas Supply Company, Katy-Waha Gas Marketing Company, Intratex Gas

Company, Natural Gas Marketing & Storage Company, Pacific Atlantic Marketing, Inc., Panhandle Gas Company, Pott Industries, inc., Marcoal Inc., Riverside Farms Company, Sunniland Pipe Line Company, Inc., Transgulf Pipeline Company, Transwestern Pipeline Company, Valley Pipe Lines, Inc., Valley Pipe Lines Offshore Division, Webb-Duval Pipeline, Inc., KMCAssociates, Incorporated, NGP Pipeline Company, Northern Intrastate Pipeline Company, Northern Natural Gas Supply Company, Northern Plains Natural Gas Company, AmNorth Inc., Pathfinder Assurance Limited, Enron EOR Services Company, Enron International Development Division, Gas Pipeline Group Division, Information Management Division, Northern Natural Gas Company Division, San Juan Gas Company Division, Citrus Corp., (owned by Sonat and Houston Pipe Line), Citrus Interstate Pipeline Company, Citrus Industrial Sales Company, Inc., Citrus Marketing, inc., Cirtus Trading Corp., Florida Gas Transmission Company, Enron/Dominion Cogen Corp. (Dominion Resources), Cogenron Inc. (ECIC owns 100% of common; Outside Investors own 100% of preferred stock), Enron Bayou Co-Gen, Inc., Enron Cogeneration One Company, Enron Cogeneration Two Company, Enron Cogeneration Three Company, Enron Cogeneration Four Company, Enron Cogeneration Five Company, Enron Cogeneration Resources Company, Enron Cogeneration Six Company, HT Gathering Company, Tengasco and Houston Pipe Line, Jubilee Pipeline Company, Oklahoma Gas Pipeline Company, Enron Mobile Bay, Inc., Tabasco Gas Pipe Line Company, Sonat Mobile Bay Inc., Odeco Gas Gathering Inc., Murphy Gas Gathering Inc., Mojave Pipeline Operation Company, Mojave Pipeline Company, Enron Mojave, Inc., El Paso Mojave, Norelf Limited, Corelf, Gazocean, Northern Border Pipeline Company, Northern Plains Natural Gas Company, Pan Border Gas Company, TransCanada Border Pipeline Ltd., United Mid-Continent Pipeline Company, Norwest Border Pipeline Company, Oasis Pipe Line Company,

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The Dow Chemical Company, Tenngasco Gas Supply Company, San Marco Pipeline Company, The Denver & Rio Grande Western Railroad Co., Seagull Shoreline System, Northern Interstate Pipeline Company, Texas Eastern Offshore Company and Seagull Transmission Company, The Standard Shale Products Company, Conoco, Zapata Gulf Marine Corporation, Zapata Corporation, Halliburton Company

CITIES SERVICE GAS COMPANY, a corporation whose corporate name has been changed to WILLIAMS NATURAL COMPANY; COLORADO INTERSTATE GAS COMPANY, a corporation; EL PASO NATURAL GAS COMPANY, a corporation; KANSAS-NEBRASKA NATURAL GAS COMPANY, INC. a corporation whose corporate name has been changed to KN ENERGY, INC.; MICHIGAN WISCONSIN PIPELINE COMPANY, a corporation; NATURAL GAS PIPELINE COMPANY OF AMERICA, a corporation; NORTHERN NATURAL GAS COMPANY a division of INTERNORTH, INC., a corporation; PANHANDLE EASTERN PIPELINE COMPANY, a corporation; and TRANSWESTERN PIPELINE COMPANY, a corporation, Appellants, v. OKLAHOMA TAX COMMISSION, Appellee.

No. 70,127. May 2, 1989.

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY Honorable Bryan C. Dixon, Trial Judge

After the appellants paid the Oklahoma conservation excise tax under protest, they filed this action alleging that the severance tax on natural and casinghead gas was unconstitutional seeking a refund. The trial court found

that the tax neither discriminates nor places an undue burden on interstate commerce. It further found that the tax did not violate the Supremacy Clause, the Due Process Clause or the Equal Protection Clause. We find that: 1) The conservation excise tax is in harmony with the Commerce Clause, Due Process Clause and the Equal Protection Clause. It is fairly apportioned, it does not discriminate against interstate commerce, and it is fairly related to services which the state provides to the taxpayer. 2) The conservation excise tax is not in conflict with the Federal Natural Gas Act, the Supremacy Clause, or the authority of the Federal Energy Regulatory Commission under 15 U.S.C. §3320 (1978).

AFFIRMED

Lee B. Thompson Attorney for Appellants, Oklahoma City.

William J. Legg, S. Paul Hammons ANDREWS, DAVIS, LEGG, BIXLER, MILSTEN & MURRAH, Oklahoma City, Attorneys for Appellants.

Bryce A. Baggett Oklahoma City, Attorney for Appellee.

KAUGER, J. The issue presented is whether the Oklahoma Conservation Excise Tax is unconstitutional under either the United States and Oklahoma Constitutions. Specifically, the appellants/pipeline companies allege that the Oklahoma's Conservation Excise Tax violates the Commerce Clause, the Supremacy Clause, the Equal Protection Clause, the Due Process Clause, the Privileges and

Immunities Clause and is contrary to the Fifth and Fourteenth Amendments of the Constitution of the United States and violates the Okla. Const., art. 2, §§2, 6, 7, 23 and 24.¹ We find that: 1) The conservation excise tax is consistent with the Commerce Clause,² Due Process Clause and the Equal Protection Clause.³ It is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services which the state provides to the taxpayer. 2) The conservation excise tax neither conflicts with the Federal Natural Gas Act, the Supremacy Clause,⁴ nor the authority of the Federal Energy Regulatory Commission under 15 U.S.C. §3320 (1978).⁵

FACTS

The appellants, interstate pipeline companies, buy natural gas in Oklahoma for resale outside the state. After the natural gas from producing wells is placed in the pipeline, it flows steadily and continuously through the states in which the pipelines and compressor facilities are located. The pipeline companies have paid, under protest, the conservation excise tax. Although the tax is levied on the producers, the pipeline companies have agreed to pay the tax. The pipeline companies brought this action in the district court alleging that the conservation excise tax violated the Commerce Clause, the Supremacy Clause, the Equal Protection Clause, and the Due Process Clause. They also sought a refund of the taxes which they paid under protest. The trial court found that the tax neither violated the United States Constitution nor the Oklahoma Constitution. The pipeline companies appeal this ruling.

THE TAX AND ITS HISTORY

In 1977, the legislature enacted the conversation excise tax which levied a tax on the act of severance.⁶ The levy is imposed on all natural gas and/or casinghead gas produced, and it includes both working and royalty interests. Liability for the tax attaches to the producers and/or royalty owners creating a first lien on their real and personal property. If a producer is reimbursed by the pipeline company for the tax, the remittance of the tax by the pipeline company is to the Oklahoma Tax Commission and not to the producer. Should the pipeline company fail to remit, the requirement that the pipeline company remit that portion of the tax which has been reimbursed to the producer does not release the producer from tax liability. The amount of tax is calculated at seven cents on each thousand cubic feet (MCF) of produced gas, less seven percent of the gross value of that MCF of produced gas. The levied tax cannot exceed one-third of the gross value of each such MCF of produced gas, and the levied tax cannot be less than zero.⁷

Under the calculating formula, the seven cents is offset when the gross value of the MCF of produced gas reaches one dollar. The restriction of one-third of the gross value comes into play when the gross value of the MCF of produced gas is seventeen and one-half cents. The levied tax operates on the production of gas having a gross value per MCF between one dollar and seventeen and one-half cents. The amount of tax increases as the value of produced gas decreases.⁸

THE CONSERVATION EXCISE TAX DOES NOT VIOLATE THE COMMERCE CLAUSE, DUE PROCESS CLAUSE, OR THE EQUAL PROTECTION CLAUSE. IT IS FAIRLY APPORTIONED, DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE, AND IS FAIRLY RELATED TO SERVICES WHICH THE STATE PROVIDES TO THE TAXPAYER.

The United States Constitution, Art. I, §8, provides that Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes". The pipeline companies contend that our decision in *Post Oak Oil Co. v. Oklahoma Tax Commission*, 575 P.2d 946 (Okla. 1978), which upheld that the constitutionality of the conservation excise tax and the corresponding tax credit under the Commerce Clause, is not dispositive because the United States Supreme Court opinions relied on in *Post Oak* are no longer controlling. In essence, the pipeline companies' position is that: Oklahoma does not have an inherent right to tax the intrastate severance of natural gas which may ultimately enter interstate commerce; the right to tax depends on federal leave; and if the tax can be interpreted to hamper or hinder commerce between the states, it is prohibited.

The pipeline companies contend that the United States Supreme Court expressly disapproved the *Post Oak* reasoning in *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 43 S.Ct. 526, 67 L.Ed. 929 (1923). We do not agree. Rather the Court in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617, 101 S.Ct. 2946, 2953, 69 L.Ed. 2d 884, 894 (1981), *reh'g, denied*, 453 U.S. 927, 102 S.Ct. 889, 69 L.Ed. 2d 1023 (1981), determined that state severance taxes are not

exempted from Commerce Clause examination by a claim that the tax is imposed on goods prior to their entry into the stream of interstate commerce. (Nevertheless, the Court noted that *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237 (1922) and its progeny were not wrongly decided.) In those decisions since *Oliver*, the United States Supreme Court, has moved away from the immunity per se rule which prevented state taxation of interstate commerce.⁹ Instead, the present rule is one of accommodation recognizing that if interstate commerce utilized the services and protections of a state it is required to pay its own way.¹⁰ For this reason, the United States Supreme Court has allowed state taxation encroachments upon interstate commerce if there are local incidents which justify the taxation.¹¹

Local occurrences, which are severable from interstate commerce but which occur within a state, were recognized in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed. 2d 326 (1977), *reh'g denied*, 430 U.S., 976, 97 S.Ct. 1669, 52 L.Ed. 2d 371 (1977). *Complete Auto* involved the taxation of a motor carrier which transported out-of-state manufacturer's automobiles between points in the state. *Complete Auto* noted that interstate commerce may be made to pay its way, and that the permissibility of state taxation is based upon its actual effect rather than its legal terminology. The United States Supreme Court set forth a four pronged test:

- 1) Whether the tax is applied to an activity with a substantial nexus with the taxing state;
- 2) Whether it is fairly apportioned;
- 3) Whether the tax discriminates against interstate commerce and;

- 4) Whether the tax is fairly related to the services provided by the state.

These standards must be used to decide whether the state taxes on interstate commerce are permissible under the United States Constitution.

In *Commonwealth Edison Co., supra*, the United States Supreme Court permitted state taxation of interstate commerce. Montana levied a severance tax on each ton of coal mined in the state, including coal mined on federal land. The tax was assessed at differing rates depending on the value, energy content, and means of extraction of the coal, and could equal, at a maximum, 30% of the contract sales price. The Court found that Montana could constitutionally raise general revenue by imposing a severance tax on coal mined in the State. The entire value of the coal, before transportation, originated in the State; and mining of the coal depleted the resource base and wealth of the state, thereby decreasing a future source of taxes and economic activity. The Court further found that if, as here, a general revenue tax does not discriminate against interstate commerce, and if it is apportioned to activities occurring within the state, the state is free to pursue its own fiscal program. However, the practical application of a tax the state has exacted must be related to the opportunities which it has given, and to the benefits which it has conferred by being an orderly, civilized society. Thus, the Court found a nexus, a proper apportionment, and a rational relationship between the income attributed to the state and the interstate values of the enterprise.

In *Goldberg v. Sweet*, ___ U.S. ___, 109 S.Ct. 582, 102 L.Ed. 2d 607 (1989),¹² Illinois has imposed a 5% tax on the gross charges of interstate telecommunications originated

or terminated in the State and charged to an Illinois service address. The United States Supreme Court found that the tax was fairly apportioned, that it did not discriminate against interstate commerce, and that it was fairly related to services which the state of Illinois provided to the taxpayer.

A.

WHETHER THE TAX IS APPLIED TO AN
ACTIVITY WITH A SUBSTANTIAL NEXUS WITH
THE TAXING STATE

Commonwealth Edison and *Goldberg* stand for the proposition that the United States Supreme Court permits states to tax products in interstate commerce once the four prong test of *Complete Auto* has been met. Obviously, the only and substantial nexus of the severance of natural gas is in Oklahoma.

B.

WHETHER THE TAX IS FAIRLY APPORTIONED.

The pipeline companies argue that the apportionment is unequal because the Oklahoma income tax code provides for a tax credit. Apportionment as used in *Complete Auto*, means that the tax is assessed only on the portion of activity in the taxing state with slight or no possibility that multiple taxation will occur. In this case, Oklahoma is the only state which can tax the severance, and it taxes only the natural gas actually severed. The pipeline companies contend that the tax discriminates

against interstate commerce because under the tax formula 80% of the gas taxed is piped to other states. However, like *Commonwealth Edison*, the tax is computed at the same rate regardless of the final destination of the gas. There is no suggestion that the tax is administered in a manner departing from this evenhanded formula. Therefore, the tax is not discriminatory.

C.

WHETHER THE TAX DISCRIMINATES AGAINST INTERSTATE COMMERCE.

The pipeline companies argue that while the tax is facially non-discriminatory, when it is coupled with the tax credit provided under 68 O.S. 1981 §2357,¹³ it becomes overtly discriminatory. In *Post Oak*, the Court found that: 1) only the royalty and working interest owners were liable for the tax; 2) only royalty and working interest owners could receive credit for the actual payment of the conservation excise tax; and 3) if the royalty and working interest owners were reimbursed by the purchasers for resale, or if the tax were passed through to a consumer, no tax credit would be allowed. The basis for the holding here is that the pipeline companies are not taxpayers – they are resale purchasers who voluntarily contracted to buy gas and to pay taxes.

If the pipeline companies fail to pay the taxes, they have no liability for failing to do so. Rather, the royalty and working interest owners must pay the severance tax. The Commission has a cause of action for failure to pay severance taxes against the royalty and working interest owners, not against the purchaser. The only action which

might be brought against the pipeline companies would be one by the royalty and working interest owners for breach of contract. There is no discrimination against the pipeline companies because their status as purchaser does not, in the absence of a contract so providing, either obligate them to pay the tax, or define them as an entity from whom taxes are due under 68 O.S. 1981 §1110.¹⁴

The pipeline companies contend that *Maryland v. Louisiana*, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed. 2d 576 (1981), which was decided after *Post Oak* is controlling. However, *Maryland* is readily distinguishable. There, Louisiana imposed a first use tax on off-shore oil which was extracted from the outer continental shelf and piped to refining plants in Louisiana. First use taxes were levied on all natural gas which was imported into Louisiana which had not been previously taxed by another state. A corresponding tax credit was given to purchasers who used the gas in state. The United States Supreme Court found the first use tax and corresponding tax credit discriminatory. The Court's holding was premised on the finding that the first use tax was not a compensatory tax.

A compensatory tax is one which is imposed by the state as the result of identifying a burden on the state which can be offset, to some extent, by levying a tax. The Court's example of a compensatory tax was a severance tax – a state has an interest in the severance of natural resources from its soil. The first use tax in Maryland was found to be a non compensatory tax on the basis that Louisiana did not have a sovereign interest in receiving reparation for the severance of resources from the federally owned outer continental shelf. However, Oklahoma has a sovereign interest in being recompensed for the

severance of natural resources from its native soil. The *Commonwealth Edison* teaching is that the Commerce Clause does not give the inhabitants of one state a right to control either the terms of resource development or resource depletion in a sister state.

D.

WHETHER THE TAX IS FAIRLY RELATED TO THE
SERVICES PROVIDED BY THE STATE.

The fourth prong of the *Complete Auto* test is whether the activity is related to services provided by the state. The pipeline companies contend that the tax is not a severance tax, but rather a tax on the privilege of purchasing or taking gas in Oklahoma. Like the parties in *Commonwealth Edison*, the pipeline companies have miscomprehended the essence of the fourth prong of the test. The tax need not reimburse the state for the cost of specific services dispensed to the natural gas industry. The Legislature stated that its intention was to use the tax to provide funds for energy preservation or energy research programs, for unfunded debts of public retirement systems, and for the general government of the state.¹⁵

The pipeline companies would severely limit this test by focusing solely on those services which Oklahoma provides to natural gas activity located within the state. However, the tax which may be imposed on a particular interstate transaction need not be confined to the cost of the services incurred by the state on account of that activity. On the contrary, both *Commonwealth Edison* and *Goldberg* acknowledge that interstate commerce may

be required to contribute to the cost of providing all governmental services, including those services from which it arguably receives no direct benefit.¹⁶ The fourth prong of the Complete Auto test thus focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue. A taxpayer's receipt of police and fire protection, the use of public roads, and the other advantages of civilized society satisfy the requirement that the tax be fairly related to benefits provided by the State to the taxpayer.¹⁷

We hold that the conversation tax does not violate the Commerce Clause, Due Process Clause, or the Equal Protection Clause. It is fairly apportioned, it does not discriminate against interstate commerce, and it is fairly related to services which the state provides to the taxpayer.

II.

THE CONSERVATION EXCISE TAX IN THE PRESENT CASE IS NOT IN CONFLICT WITH THE NATURAL GAS ACT, THE SUPREMACY CLAUSE, OR THE AUTHORITY OF THE FEDERAL COMMISSION UNDER 15 U.S.C. §3320 (1978).

The pipeline companies allege that the conversation excise tax violates the Supremacy Clause of the United States Constitution. They argue that the tax is an attempt by the Oklahoma Legislature to interfere with the Federal Energy Regulatory Commission's exclusive authority to regulate interstate transportation and the sale of natural gas. We disagree.

Congress has the power under the Supremacy Clause to pre-empt state law. Determining whether it has exercised this power, we must examine congressional intent. Congress allows states to impose a severance tax. Title 15 U.S.C §3320 specifically provides that a state may levy a severance tax and the additional tax is not considered to exceed the maximum lawful price of natural gas allowed by the Act.¹⁸ The conversation excise tax prescribed by 68 O.S. 1981 §1108 does not conflict with the Natural Gas Act, the Supremacy Clause, or the authority of the Federal Commission under §3320.¹⁹

AFFIRMED

HARGRAVE, C.J., OPALA, V.C.J., HODGES, LAVENDER, SIMMS, DOOLIN, KAUGER, SUMMERS, JJ., Concur.

¹ The parties briefed only the issues involving the Commerce Clause, the Due Process Clause, the Equal Protection Clause, and the Supremacy Clause of the United States Constitution.

² The Commerce Clause, United States Const., Art. I, §8, provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

³ The United States Const., amend. XIV, §1, provides in pertinent part:

" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Okla. Const., art. 2, §7 provides:

"No person shall be deprived of life, liberty, or property, without due process of law."

⁴ The Supremacy Clause, United States Const. Art. VI, provides in pertinent part:

" . . . This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

⁵ Treatment of state severance tax, 15 U.S.C. §3320 (1978), provides:

"(a) Allowance for State severance taxes and certain production-related costs. Except as provided in subsection (b) of this section, a price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this part if such first sale price exceeds the maximum lawful price to the extent necessary to recover.

(1) State severance taxes attributable to the production of such natural gas and borne by the seller, but only to the extent the amount of such taxes does not exceed the limitation of subsection (b) of this section; and

(2) any costs of compressing, gathering, processing, treating, liquifying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission.

(b) Limitation on State severance taxes. The State severance tax allowable under subsection (a)(1) of this section with respect to the production of any natural gas may not include any amount of state severance taxes borne by the seller which results from a provision of State law enacted on or after December 1, 1977, unless such provision of law is equally applicable to natural gas produced in such State and delivered in interstate commerce and to natural gas produced in such State and not so delivered.

(c) Definition of State severance tax. For purposes of this section the term 'State severance tax' means any severance, production, or similar tax, fee, or other levy imposed on the production of natural gas

(1) by any State or Indian tribe (as defined in section 3316(b)(2)(B)(ii) of this title); and

(2) by any political subdivision of a State if the authority to impose such tax, fee, or other levy is granted to such political subdivision under State law."

⁶ The Legislative intent is expressed in 68 O.S. 1981 §1107, which provides:

"It is hereby declared the intent of the Legislature to levy a conservation tax on the severance of natural gas and/or casinghead gas to be used for the following purposes:

1. To provide funds for energy conservation or energy research programs for Oklahoma;
2. To provide funds for unfunded liabilities of public retirement systems; and
3. To provide funds for the general government of the State of Oklahoma. -

⁷ The conservation excise tax statute, 68 O.S. 1981 §1108, provides in pertinent part:

A. There is hereby levied on all natural gas and/or casinghead gas produced and saved, excluding nontaxable royalty, a conservation excise tax of seven cents (\$0.07) per thousand (1,000) cubic feet (MCF), less seven percent (7%) of the gross value of each such MCF of natural gas and/or casinghead gas; provided that the conservation excise tax hereby levied shall not exceed one-third ($\frac{1}{3}$) of the gross value of each such MCF of the natural gas and/or casinghead gas so produced and saved. Provided further, the conservation excise tax herein levied shall never be less than zero. . . .

C. The purchaser of the natural gas and/or casinghead gas shall remit that portion of the tax for which the producer and/or the royalty owner is reimbursed by the

purchaser. The producer and/or royalty owner shall remit that portion of the tax for which he is not reimbursed by the purchaser. If any purchaser, producer and/or royalty owner so elects, he may remit the share of conservation excise tax due hereunder from other interest owners which is not reimbursed by the purchaser. The tax levied by this section shall be due at the end of any month in which the accrued total due from the remitter reaches One Hundred Thousand Dollars (\$100,000.00); however, the tax due shall not be required to be remitted more frequently than once per calendar month. The tax will be considered delinquent forty-five (45) days after it becomes due. A remitter whose total tax due fails to reach One Hundred Thousand Dollars (\$100,000.00) during any calendar year shall remit the taxes accrued for that year by February 1 of the year following accrual. . . ."

The liability for the tax is provided in 68 O.S. 1981 §1110, which provides:

"The tax herein levied shall attach to and is the liability of the working-interest and royalty-interest owners' interests in all natural gas and/or casinghead gas produced and saved in the State of Oklahoma. In addition, the tax herein levied shall, at all times, be and constitute a first and paramount lien against the producer's and/or royalty owner's property, both real and producer's and/or royalty owner's property, both real and personal. Moreover, the provisions herein requiring the purchaser if the natural gas and/or casinghead gas remit that portion of the tax for which the producer and/or royalty owner is reimbursed by the purchaser shall not release the producer and/or royalty owner from liability to pay the same, in all cases where such tax fails to be remitted by the purchaser."

⁸ *Post Oak Oil Co. v. Okla. Tax Comm'n*, 575 P.2d 964, 967 (Okla. 1978).

⁹ *LeLoup v. Port of Mobile*, 127 U.S. 640, 646, 8 S.Ct. 1380, 1383, 32 L.Ed. 311, 313 (1887). See also, Hellerstein, "State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?", 75 Mich. L.Rev. 1426, 1443 (1977).

¹⁰ *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 108, 95 S.Ct. 1538, 1543, 44 L.Ed. 2d 1, 8 (1975); *Western Live Stock v. Bureau*, 303 U.S. 250, 254, 58 S.Ct. 546, 548, 82 L.Ed. 823, 827, 115 A.L.R. 944, 948 (1938). See also Levmore, "Interstate Exploitation and Judicial Intervention, 69 Va. L.Rev. 563, 592-93 (1983).

¹¹ *Norton Co. v. Dept. of Revenue*, 340 U.S. 534, 539, 71 S.Ct. 377, 381, 95 L.Ed. 517, 521 (1951).

¹² On April 3, 1989, the United States Supreme Court again applied the *Complete Auto* test in *Amerada Hess Corp. v. Director*, (87-453) ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed. 2d ___ (1989), which involved New Jersey's business corporation tax.

¹³ The tax credit statute, 68 O.S. 1981 §2356(D)(1), provided in pertinent part:

"D. 1. There shall be allowed as a credit against the tax imposed by Section 2355 of this title the excise taxes levied by the state on . . . natural gas or casinghead gas . . . where the combined total of such taxes amounts to more than seven and eighty-five one-thousandths percent (7.085%) of the gross value of production of the . . . gas . . . produced, . . ."

This credit is no longer allowed in §2357 which was amended in 1987. The only natural gas credit allowed is the following:

"C. 1. Every taxpayer who operates a manufacturing establishment in the state shall be allowed a direct credit against income taxes owed by such taxpayer to the state, the amount of which credit shall be proportioned to the amount of gas used or consumed in Oklahoma by such taxpayer in the operation of a manufacturing establishment, at a rate of three (3) mills per thousand (1,000) cubic feet of gas used or consumed after May 1, 1971, and during each taxable year of such taxpayer provided that the credit allowed herein shall not apply to the first twenty-five thousand (25,000) MCF of gas used or gas used to generate electricity or consumed after May 1, 1971, and during each taxable year of such taxpayer. . . ."

¹⁴ See note 7, *supra*. 10

¹⁵ Title 68 O.S. 1981 §1107, see note 6, *supra*.

¹⁶ *Goldberg v. Sweet*, ___ U.S. ___, 109 S.Ct. 582, 592, 102 L.Ed. 2d 607, 620-21 (1989); *Commonwealth Edison Co. v. Montana*, 543 U.S. 609, 627, 101 S.Ct. 2946, 2958, 69 L.Ed. 2d 884, 900 (1981) *reh'g denied* 453 U.S. 927, 102 S.Ct. 889, 69 L.Ed. 2d 1023 (1981).

¹⁷ *D.H. Holmes Co. v. McNamara*, ___ U.S. ___, 108 S.Ct. 1619, 1624, 100 L.Ed. 2d 21, 28, (1988).

¹⁸ Title 15 U.S.C. §3320 (1978), see note 5, *supra*.

¹⁹ *Post Oak Oil Co. v. Olds. Tax Comm'n*, see note 8, *supra*.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

CITIES SERVICE GAS COMPANY,)	
a corporation whose corporate)	
name has been changed to)	
WILLIAMS NATURAL GAS COMPANY;)	
COLORADO INTERSTATE GAS)	
COMPANY,)	
a corporation;)	
EL PASO NATURAL GAS COMPANY,)	
a corporation;)	
KANSAS-NEBRASKA NATURAL GAS)	
COMPANY, INC.,)	
a corporation whose corporate)	
name has been changed to)	
KN ENERGY, INC.;)	
MICHIGAN WISCONSIN PIPELINE)	
COMPANY,)	
a corporation;)	
NATURAL GAS PIPELINE COMPANY OF)	CJ-82-75
AMERICA,)	
a corporation;)	
NORTHERN NATURAL GAS COMPANY,)	
a division of INTERNORTH, INC.,)	
a corporation;)	
PANHANDLE EASTERN PIPELINE)	
COMPANY,)	
a corporation; and)	
TRANSWESTERN PIPELINE COMPANY,)	
a corporation;)	
)	Plaintiffs,
vs.)	
)	
OKLAHOMA TAX COMMISSION,)	
)	Defendant.

*JOURNAL ENTRY OF JUDGMENT WITH FINDINGS
OF FACT AND CONCLUSIONS OF LAW*

NOW on this 4th day of December, 1987, this Court, having heard the testimony of witnesses sworn and examined in open court and having heard the argument of counsel and having reviewed the exhibits, briefs and proposed findings of fact and conclusions of law by the parties and being fully advised in the premises, makes the following findings of fact, conclusions of law and renders Judgment accordingly.

This matter came on for trial on October 26, 1987, before the Honorable Bryan C. Dixon. The plaintiffs appearing by their attorneys, Lee B. Thompson, William J. Legg, S. Paul Hammons and Babette Patton, and the defendant, Oklahoma Tax Commission, appearing by its attorneys, Bryce A. Baggett and Donna E. Cox, and the Court proceeded, over the course of five days through October 30, 1987, to receive the evidence of the parties, at the close of which evidence the Court took this matter under advisement.

Plaintiffs have brought this action seeking a determination that Oklahoma's Conservation Excise Tax violates the Commerce Clause, the Supremacy Clause, the Equal Protection Clause, the Due Process Clause, the Privileges and Immunities Clause and is contrary to the Fifth and Fourteenth Amendments of the Constitution of the United States and violates Sections Two, Six, Seven, Twenty-three and Twenty-four of Article 2 of the Constitution of the State of Oklahoma. Plaintiffs seek recovery of money paid under protest in compliance with 68 O.S. §226.

FINDINGS OF FACT

The Court makes the following findings of fact:

1. Plaintiff Williams Natural Gas Co., formerly Cities Service Gas Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business in Oklahoma City, Oklahoma.

2. Plaintiff Colorado Interstate Gas Company is a corporation organized and existing under and by virtue of the law of the State of Delaware, with its principal place of business in Colorado Springs, Colorado.

3. Plaintiff El Paso Natural Gas Company is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business in El Paso, Texas.

4. Plaintiff KN Energy, formerly Kansas-Nebraska Natural Gas Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Kansas, with its principal place of business in Hastings, Nebraska.

5. Plaintiff ANR Pipeline Co., formerly Michigan Wisconsin Pipe Line Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business in Detroit, Michigan.

6. Plaintiff Mid-Con Corp., operating as Natural Gas Pipeline Company of America, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business in Chicago, Illinois.

7. Plaintiff Northern Natural Gas Company is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business in Omaha, Nebraska.

8. Plaintiff Panhandle Eastern Pipe Line Company is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business in Houston, Texas.

9. Plaintiff Transwestern Pipeline Company is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business in Houston, Texas.

10. Defendant Oklahoma Tax Commission is a statutory body created by legislative enactment and existing under the provisions of 68 O.S. 102 and is charged with, and has the exclusive jurisdiction over, the collection of the tax challenged in this case. By 68 O.S. §226 (c), the Tax Commission is the sole, necessary and proper party defendant in any such suit for refund of Oklahoma taxes, and the Tax Commission is authorized to represent the State of Oklahoma herein.

11. Each of the plaintiffs is, and was at all times relevant herein, an interstate pipeline company engaged in the purchase of natural gas within the State of Oklahoma for transportation in interstate commerce for resale.

12. After the natural gas has been taken from producing wells in Oklahoma into the plaintiff's pipelines, it flows steadily and continuously through the many states in which the plaintiff's pipelines and compressor facilities are located.

13. For many years before 1977, Oklahoma levied a severance tax, called the Gross Production Tax, upon producing and saving natural gas and/or casinghead gas (hereinafter "natural gas" or "gas") from the earth of Oklahoma. The Gross Production Tax is 7% of value. 68 O.S. §§1001 et seq.

14. In 1977, Oklahoma enacted House Bill 1441 which imposed a severance tax upon natural gas of 7 cents per thousand cubic feet (hereinafter "MCF") less 7% of the value of such gas. It limits the amount of this tax to one-third of the sales price of the natural gas and provides that the tax levied shall never be less than zero. In 1977 House Bill 1441 became Chapter 85 of the 1977 Oklahoma Session Laws. It was codified as 68 O.S. 1977 Supp., §§1107 through 1111. This tax became effective on January 1, 1978, and is known as the Conservation Excise Tax.

15. The plaintiffs have paid, under protest, the following amounts of Oklahoma's Conservation Excise Tax for the period January 1, 1978, to the specific date as listed for each plaintiff, to-wit:

Williams Natural Gas Co., formerly Cities Service Gas Company, \$2,629,388.38 through September 30, 1987.

Colorado Interstate Gas Company, \$6,665,954.15 through April 30, 1987.

El Paso Natural Gas Co., \$894,972.84 through December 31, 1986.

KN Energy, formerly Kansas Nebraska Natural Gas Company, Inc., \$3,155,759.79 net after tax credits through December 31, 1986.

ANR Pipeline Co., formerly Michigan Wisconsin Pipe Line Company, \$11,102,589.41 through September 30, 1987.

Mid-Con Corp., operating as Natural Gas Pipeline Company of America, \$3,858,642.37 through December 31, 1986.

Northern Natural Gas Company, \$9,022,281.12 through June 30, 1987.

Panhandle Eastern Pipeline Company, \$13,765,672.25 through June 30, 1987.

Transwestern Pipeline Company, \$751,929.12 through December 31, 1986.

16. The Gross Production Tax and the Conservation Excise Tax complement one another. The two statutes act together to impose the Oklahoma severance tax on gas.¹ The effect of these two tax statutes, taken together, is to levy upon gas the Oklahoma severance tax of 7% of value, with a minimum tax of 7 cents per thousand cubic feet, upon all natural gas severed (produced and saved) from the earth of Oklahoma.

The combined effect of the Gross Production Tax and the Conservation Excise Tax was to levy a minimum severance tax on all gas produced in Oklahoma of 7 cents

¹ There is also a severance tax on gas of 0.085% of 1% of value called the Petroleum Excise Tax under 68 O.S. §1102. The revenues from this Petroleum Excise Tax are dedicated (earmarked) to the Interstate Compact Fund and are not subject to annual appropriation by the Oklahoma Legislature. This Petroleum Excise Tax is not involved in the issues of this action and will not be considered further.

per MCF. Consequently, the Conservation Excise Tax does not apply to natural gas selling for \$1.00 or more per MCF, but does apply to natural gas selling for less than \$1.00.

17. There was at all times relevant herein, natural gas produced in Oklahoma and sold in both the intrastate market and the interstate market at a price of less than \$1.00 per MCF. There was also natural gas sold in the intrastate and interstate markets at a price of \$1.00 or greater per MCF.

18. The liability for the Oklahoma Gross Production Tax and for the Conservation Excise Tax is imposed by the statutes upon the owners of that natural gas in the ground; i.e., the owners of the working interest and the owners of the royalty interest.

19. Under the Conservation Excise Tax, specifically Section 1108 C, a purchaser of natural gas who has a contractual duty to the owner of such natural gas to reimburse severance taxes levied on that natural gas by the State of Oklahoma has a statutory duty to remit such tax to the Tax Commission. Otherwise, the Conservation Excise Tax must be reported and paid by the producer and/or royalty owner of such natural gas.

20. In 1978, House Bill 1706 amended 68 O.S. §1108 C to permit a purchaser of natural gas to elect to remit the Conservation Excise Tax on behalf of the producer and/or royalty owner who owed such tax.

21. Some contracts for the purchase of gas to be used in Oklahoma as well as some contracts for the

purchase of gas to be used outside Oklahoma have contained provisions for the purchaser to reimburse the producer (e.g., the owner of working interest and/or royalty interest) for severance taxes.

22. Likewise, some contracts for the purchase of gas to be used in Oklahoma and some contracts for the purchase of gas to be used outside Oklahoma have omitted such provisions for reimbursement of severance taxes.

23. The parties to a gas purchase contract determine whether or not it contains tax reimbursement clauses without regard to whether such gas would be used in Oklahoma or used outside Oklahoma.

24. The plaintiffs have remitted the Conservation Excise Tax either (1) because such plaintiffs had an obligation under their contracts with the owners of such working interest or royalty interest to reimburse such owners for severance taxes imposed upon such gas, or (2) because the plaintiffs have elected to remit such tax on behalf of the owners of working interest or royalty interest liable therefor under the election provided by the 1978 amendment to 68 O.S. §1108 C.

25. Each of these plaintiffs recovered all or substantially all of the Oklahoma Conservation Excise Tax remitted by such plaintiffs from subsequent purchasers of such gas from these plaintiffs under the regulations of the Federal Energy Regulatory Commission which provide specifically for the recovery of such severance taxes.

26. The Conservation Excise Tax does not distinguish between natural gas to be consumed in Oklahoma or natural gas to be consumed elsewhere.

27. The Oklahoma Tax Commission does not, in its reports and returns of the Conservation Excise Tax require or obtain any information which would distinguish natural gas consumed in Oklahoma from natural gas consumed elsewhere.

28. The amount of the Conservation Excise Tax on natural gas is determined without regard to whether such natural gas will be consumed in Oklahoma or elsewhere.

29. In 1977, Oklahoma also enacted House Bill 1439 which added paragraph D to 68 O.S. §2357, allowing as a credit against Oklahoma income tax the amount of any excise tax paid upon natural gas in excess of 7.085% of value which was not reimbursed to the taxpayer.

30. In 1978, House Bill 1717 amended the credit in 68 O.S. §2357 D to extend entitlement of that credit to any purchaser, producer or royalty owner who pays the unreimbursed portion of the excise tax on gas. This amendment became effective April 24, 1978.

31. Under 68 O.S. §2357 D, a producer or royalty owner who is not reimbursed therefor can recover excise (severance) taxes upon gas which exceed 7.085% of the value of such gas. There is no distinction and no discrimination between interstate gas and intrastate gas for the purpose of such credit.

32. Subsection D of §2357 was repealed effective January 1, 1987, by §23 of 1987 House Bill 1061.

33. There was no legislative intent to discriminate against interstate commerce or place an undue burden on interstate commerce. The legislative intent was to

increase tax revenue by placing a minimum severance tax on natural gas produced in Oklahoma.

34. Any conclusion of law which is deemed to be a finding of fact is hereby incorporated herein as a finding of fact.

CONCLUSIONS OF LAW

The Court hereby makes the following conclusions of law:

1. The Conservation Excise Tax (68 O.S. §1107 through 1111) is a severance tax upon natural gas produced in Oklahoma.

2. The Conservation Excise Tax and the Gross Production Tax (68 O.S. §1001 et seq) are complementary to one another. These two act together to impose the Oklahoma severance tax on natural gas and must be considered together in reviewing Plaintiff's claims.

3. The liability for this severance tax on natural gas is imposed upon the owners of that natural gas in the ground. These owners are the owners of the working interest and the royalty interest.

4. This severance tax is not imposed upon the purchasers of natural gas, which is the position held by the plaintiffs in this action.

5. Any severance tax paid herein by plaintiffs was merely as a remittance of the taxes owed by owners of the working interest or royalty interest and was paid pursuant to either (1) a contractual obligation to reimburse said owners who were liable for the tax or (2) an election

by the plaintiffs to remit such tax on behalf of said owners pursuant to 68 O.S. §1108 C.

6. The Conservation Excise Tax does not discriminate against interstate commerce nor does it place an undue burden thereon.

7. 68 O.S. §2357 D allows an income tax credit against Oklahoma income tax to any purchaser, producer or royalty owner who paid an unreimbursed Oklahoma severance tax in excess of 7.085% of value of the natural gas. As the tax liability for the severance taxes falls only upon owners of the royalty interest or working interest, who must file Oklahoma income tax returns for their natural gas income, this credit does not discriminate against interstate commerce or place an undue burden thereon.

8. The legislature enacted these statutes under review with no intent to discriminate against interstate commerce or place an undue burden thereon.

9. The Conservation Excise Tax and 68 O.S. §2357 D do not violate the Commerce Clause, the Supremacy Clause, the Equal Protection Clause, the Due Process Clause, the Privileges and Immunities Clause, the Fifth Amendment or the Fourteenth Amendment of the U.S. Constitution and do not violate Sections Two, Six, Seven, Twenty-three and Twenty-four of the Oklahoma Constitution. *Post Oak Oil Co. v. Oklahoma Tax Commission*, 575 P.2d 964 (Okla. 1978).

10. Any finding of fact which is deemed to be a conclusion of law is hereby incorporated herein as a conclusion of law.

IT IS THEREFORE ORDERED, ADJUDGED AND
~~DECREED that the defendant is hereby granted judgment~~
that the plaintiffs recover nothing in this action, and the
defendant is granted judgment against the plaintiffs for
the costs of this action, the amount of which costs is
reserved for subsequent adjudication upon application of
the defendant.

/s/ Bryan C. Dixon
BRYAN C. DIXON
District Judge

§ 717. Necessity for regulation of natural gas companies

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and

facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. June 21, 1938, c. 556, § 1, 52 Stat. 821; Mar. 27, 1954, c. 115, 68 Stat. 36.

§ 3320. Treatment of State severance taxes and certain production-related costs

(a) Allowance for State severance taxes and certain production-related costs. – Except as provided in subsection (b) of this section, a price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this part if such first sale price exceeds the maximum lawful price to the extent necessary to recover. –

(1) State severance taxes attributable to the production of such natural gas and borne by the seller, but only to the extent the amount of such taxes does not exceed the limitation of subsection (b) of this section; and

(2) any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission.

(b) Limitation on State severance taxes. – The State severance tax allowable under subsection (a)(1) of this section with respect to the production of any natural gas may not include any amount of State severance taxes borne by the seller which results from a provision of State law enacted on or after December 1, 1977, unless such provision of law is equally applicable to natural gas produced in such State and delivered in interstate commerce and to natural gas produced in such State and not so delivered.

(c) Definition of State severance tax. – For purposes of this section, the term "State severance tax" means any severance, production, or similar tax, fee, or other levy imposed on the production of natural gas –

(1) by any State or Indian tribe (as defined in section 3316(b)(2)(B) (ii) of this title); and

(2) by any political subdivision of a State if the authority to impose such tax, fee, or other levy is granted to such political subdivision under State law.

(Pub.L. 95-621, Title I, § 110, Nov. 9, 1978, 92 Stat. 3368.)

CONSERVATION EXCISE TAX

§ 1107. Legislative intent

It is hereby declared the intent of the Legislature to levy a conservation tax on the severance of natural gas and/or casinghead gas to be used for the following purposes:

1. To provide funds for energy conservation or energy research programs for Oklahoma;

2. To provide funds for unfunded liabilities of public retirement systems; and

3. To provide funds for the general government of the State of Oklahoma.

Laws 1977, c. 85, § 1, eff. Jan. 1, 1978.

§ 1108. Conservation excise tax

A. There is hereby levied on all natural gas and/or casinghead gas produced and saved, excluding nontaxable royalty, a conservation excise tax of seven cents (\$0.07) per thousand (1,000) cubic feet (MCF), less seven percent (7%) of the gross value of each such MCF of natural gas and/or casinghead gas; provided that the conservation excise tax hereby levied shall not exceed one-third (1/3) of the gross value of each such MCF of the natural gas and/or casinghead gas so produced and saved. Provided further, the conservation excise tax herein levied shall never be less than zero.

B. For the purposes of this section, natural gas and/or casinghead gas, when produced and utilized in any manner, shall be considered as the amount of gas produced and saved, except gas which is:

1. Injected into a formation for the purpose of recycling, repressuring or pressure maintenance or for any other purpose which enhances the ultimate recovery of oil or other hydrocarbons;

2. Lawfully vented or flared;

3. Used in a gas-lift operation or field operations;

4. Used in the operation of compression facilities or of gasoline or recycling plants; or

5. Attributable to the shrinkage volume for the extraction of liquid hydrocarbons.

C. The purchaser of the natural gas and/or casinghead gas shall remit that portion of the tax for which the producer and/or the royalty owner is reimbursed by the purchaser. The producer and/or royalty owner shall remit that portion of the tax for which he is not reimbursed by the purchaser. If any purchaser, producer and/or royalty owner so elects, he may remit the share of conservation excise tax due hereunder from other interest owners which is not reimbursed by the purchaser. The tax levied by this section shall be due at the end of any month in which the accrued total due from the remitter reaches One Hundred Thousand Dollars (\$100,000.00); however, the tax due shall not be required to be remitted more frequently than once per calendar month. The tax will be considered delinquent forty-five (45) days after it becomes due. A remitter whose total tax due fails to reach One Hundred Thousand Dollars (\$100,000.00) during any calendar year shall remit the taxes accrued for that year by February 1 of the year following accrual.

D. In addition to any other data sent monthly to a producer and/or the royalty owner, the purchaser shall also furnish an accounting of the nonreimbursed conservation tax liability which is due and remittable by the producer and/or the royalty owner.

E. Any tax reimbursement received as a result of taxes levied under this section shall not be considered by the Oklahoma Tax Commission as part of the gross value for the computation of gross production taxes, petroleum excise taxes or the tax herein levied.

Laws 1977, c. 85, § 2, eff. Jan. 1, 1978; Laws 1978, c. 226, § 1, emerg. eff. April 24, 1978.

§ 1109. Reports – Forms – Rules and regulations

The Oklahoma Tax Commission is authorized and empowered to prescribe and promulgate all necessary report forms, rules and regulations for the purpose of making and filing of all reports necessary for the enforcement of this act.

Laws 1977, c. 85, § 3, eff. Jan. 1, 1978.

§ 1110. Liability for tax – Liens – Release from liability

The tax herein levied shall attach to and is the liability of working-interest and royalty-interest owners' interests in all natural gas and/or casinghead gas produced and saved in the State of Oklahoma. In addition, the tax herein levied shall, at all times, be and constitute a first and paramount lien against the producer's and/or royalty owner's property, both real and personal. Moreover, the provisions herein requiring the purchaser of the natural gas and/or casinghead gas to remit that portion of the tax for which the producer and/or royalty owner is reimbursed by the purchaser shall not release the producer and/or royalty owner from liability to pay the same, in all cases where such tax fails to be remitted by the purchaser.

Laws 1977, c. 85, § 4, eff. Jan. 1, 1978.

§ 1111. Special Conservation Fund

There is hereby created in the State Treasury a special fund to be designated the "Special Conservation Fund" in

which all of the receipts received by the Oklahoma Tax Commission from the tax levied by Section 1108 of this title shall be credited monthly. No money on deposit with the State Treasurer to the credit of the Special Conservation Fund shall be expended except pursuant to legislative appropriation.

Laws 1977, c. 85, § 5, eff. Jan. 1, 1978; Laws 1978, c. 21, § 1, emerg. eff. March 10, 1978.

Section 2 of Laws 1978, c. 21, provides for severability.

TAX CREDIT ACT

D. 1. There shall be allowed as credit against the tax imposed by section 2355 of this title the excise taxes levied by the state on asphalt, ores bearing lead, zinc, jack, gold, silver, copper, petroleum or other crude oil or other mineral, oil, natural gas or casinghead gas or coal where the combined total of such taxes amounts to more than seven and eighty-five one-thousandths percent (7.085%) of the gross value of production of the mineral, oil, gas or coal produced, as follows:

a. If, under the terms of a contract between a producer and his purchaser which has continued in force since December 31, 1976, the excise taxes in excess of seven and eighty-five one-thousandths percent (7.085%) are not reimbursed to a producer or royalty owner, then that unreimbursed portion of the excise taxes in excess of seven and eighty-five one-thousandths percent (7.085%) shall be allowed as a direct credit against income taxes owed by the purchaser, producer or royalty owner who pays the said unreimbursed portion of excise tax, whether paid on his own behalf or on the behalf of other interest owners to the state.

b. If the purchaser, producer or royalty owner who pays the unreimbursed portion of excise tax elects to take the tax credit, the credit shall not be limited to the tax liability under Section 2355 of this title. If the tax credit exceeds the liability, the purchaser, producer or royalty owner may apply for a refund.

2. Any excise taxes for which the producer or royalty owner is actually reimbursed shall not be included as a credit against the tax imposed by Section 2355 of this title, regardless of the contract provisions.

3. No excise taxes paid by a producer or royalty owner whether reimbursed or not under the terms of contracts entered into or renegotiated, as to tax-reimbursement provisions, after December 31, 1976, shall be allowed as a credit against the Oklahoma income tax under Section 2355 of this title by the purchaser, producer or royalty owner.

4. For all taxable years beginning after December 31, 1979, any person who purchases natural gas or casing-head gas from any producer, royalty owner, wholesaler, transmitter or retailer of such gas and who reimburses the producer, royalty owner, wholesaler, transmitter or retailer for excise taxes in excess of seven and eighty-five one-thousandths percent (7.085%) of the gross value of such gas shall be allowed a direct credit in the amount of such reimbursement against the tax imposed by Section 2355 of this title, when such natural gas or casinghead gas is used for agricultural purposes. Agricultural purposes, for purposes of this section, is defined to include: Clearing, terracing, or otherwise preparing ground on a farm; preparing soil for planting and fertilizing, cultivating, raising and harvesting crops; raising and feeding livestock and poultry and building fences; pumping water for any and all uses on the farm, including irrigation; building roads upon any farm by the owner or person farming same; operating milking machines; sawing wood for use on farm; producing electricity for use on farm; movement of tractors, farm implements and equipment from one field to another; use of farm tractors to move farm products from farm to market; or any related purpose.

IN THE SUPREME COURT OF THE STATE
OF OKLAHOMA

CITIES SERVICE GAS COMPANY,)	
a corporation whose corporate)	
name has been changes to)	
WILLIAMS NATURAL COMPANY;)	
COLORADO INTERSTATE GAS)	
COMPANY,)	
a corporation;)	
EL PASO NATURAL GAS COMPANY,)	
a corporation;)	
KANSAS-NEBRASKA NATURAL GAS)	
COMPANY, INC.)	
a corporation whose corporate)	
name has been changed to)	
KN ENERGY, INC.;)	
MICHIGAN WISCONSIN PIPELINE)	
COMPANY,)	
a corporation;)	
NATURAL GAS PIPELINE COMPANY)	No. 70, 127
OF AMERICA,)	
a corporation;)	
NORTHERN NATURAL GAS COMPANY,)	
a division of INTERNORTH, INC.,)	
a corporation;)	
PANHANDLE EASTERN PIPELINE)	
COMPANY,)	
a corporation; and)	
TRANSWESTERN PIPELINE COMPANY,)	
a corporation;)	
Appellants,)	
vs.)	
OKLAHOMA TAX COMMISSION,)	
Appellee.)	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

(Filed JUL 26, 1989)

Notice is hereby given that Colorado Interstate Gas Company, El Paso Natural Gas Company, KN Energy, Inc., ANR Pipeline Company, formerly Michigan Wisconsin Pipeline Company, Natural Gas Pipeline Company of America, Northern Natural Gas Company, Panhandle Eastern Pipeline Company, and Transwestern Pipeline Company hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Oklahoma, affirming the decision of the Oklahoma County District Court, entered in this action on May 2, 1989.

This appeal is taken pursuant to 28 U.S.C. § 1257.

/s/ William J. Legg
William J. Legg, OBA #5360
S. Paul Hammons, OBA #3786

-of-

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ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Notice of Appeal to the Supreme Court of the United States was mailed, postage prepaid, this 26th day of July, 1989, to:

Bryce Baggett
5801 N.W. Grand Blvd., Suit B
Oklahoma City, Oklahoma 73118
Attorney for Appellee, Oklahoma Tax Commission

/s/ William J. Legg

No. 89-188

Supreme Court, U.S.

FILED

AUG 30 1989

JOSEPH F. SPANIEL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1989

COLORADO INTERSTATE GAS COMPANY, et al.,
Petitioners,
vs.

OKLAHOMA TAX COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The
Supreme Court Of The State Of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

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August 30, 1989

THE QUESTION PRESENTED

The only question presented in this case is:

Whether Oklahoma may levy and collect a severance tax of at least 7 cents per mcf upon all gas produced from the earth of Oklahoma without offending the Commerce Clause or the Supremacy Clause of the Constitution of the United States, when such severance tax is applied to all gas produced in Oklahoma without discrimination as to whether that gas is consumed in Oklahoma or elsewhere.

THE PARTIES

Respondent acknowledges the correctness of the statement of The Parties on page ii of the Petition for Writ of Certiorari. The Oklahoma Tax Commission is exclusively designated by 68 O.S. 1981, Section 226(c) to represent the interests of the State of Oklahoma in such a case.

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No. 89-188

In The
Supreme Court of the United States
October Term, 1989

COLORADO INTERSTATE GAS COMPANY, et al.,
Petitioners,
vs.

OKLAHOMA TAX COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The
Supreme Court Of The State Of Oklahoma

**BRIEF OF RESPONDENT
IN RESPONSE TO
PETITION FOR WRIT OF CERTIORARI**

Respondent Oklahoma Tax Commission respectfully submits that a Writ of Certiorari should not be issued. The opinion of the Supreme Court of Oklahoma is correct. It affirmed the judgment of the District Court of Oklahoma County against Petitioners' claim. That judgment was entered after trial on the merits by District Judge Bryan C. Dixon who made detailed findings of fact.

Judge Dixon found as a fact that these Oklahoma severance taxes do not discriminate against interstate commerce nor violate the Supremacy Clause.

OPINIONS BELOW

1. The Journal Entry of Judgment with Findings of Fact and Conclusions of Law entered December 4, 1987 by the District Court of Oklahoma County, Oklahoma is unreported. It appears at pages 24 through 35 of the Appendix to the Petition for a Writ of Certiorari (hereafter "Petitioners' Appendix").

2. The opinion of the Supreme Court of the State of Oklahoma entered May 2, 1989 appears at pages 6 through 23 of Petitioners' Appendix. It is reported at 68 Oklahoma Bar Journal 1128 and at 774 P. 2d 468.

3. The petitioners made these same claims in CIV-78-0328-E in the United States District Court for the Western District of Oklahoma. In an unreported memorandum opinion and order dated April 28, 1980, District Judge Luther B. Eubanks dismissed that complaint because the District Court lacked subject matter jurisdiction under 28 U.S.C. § 1341.

4. The United States Court of Appeals for the Tenth Circuit affirmed that dismissal on August 5, 1981, in an opinion reported at 656 F.2d 584.

5. The Supreme Court of the United States denied a petition for certiorari in No. 81-733 on December 14, 1981, as reported at 454 U.S. 1124.

STATEMENT OF JURISDICTION

Respondent acknowledges the correctness of the Statement of Jurisdiction on page 2 of the Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts the petitioners' statement of the Constitutional and Statutory Provisions Involved (pages 2 and 3 of the petition) *except* for its last paragraph which incorrectly presents the two Oklahoma Statutes in this case.

The Oklahoma Conservation Excise Tax at pages 38 through 42 of the Petitioners' Appendix is not a correct printing of House Bill 1441 as enacted in 1977 *because* it includes the 1978 amendments to Sections 1108 and 1111. These 1978 amendments enabled purchasers such as these petitioners to elect to remit the conservation excise tax owed by producers and/or royalty owners.

Likewise, the Petitioners' Appendix, pages 43 and 44, presents an incorrect printing of the credit against income tax as enacted in 1977 House Bill 1439 *because* it includes the 1978 amendments enacted after the decision in *Post Oak Oil Company vs. Oklahoma Tax Commission*, 575 P.2d 964 (Okla. 1978). The Oklahoma Supreme Court in the *Post Oak* case determined that the credit was available only to producers and/or royalty owners. The 1978 amendments enabled purchasers such as these petitioners

to also claim the credit for unreimbursed severance taxes remitted by such purchasers.

The credit in 68 O.S. § 2357 D was repealed by Section 23 of 1987 House Bill 1061 which became effective on January 1, 1987. Therefore, the complaint of these petitioners as to the credit became moot after January 1, 1987.

RESPONDENT'S STATEMENT OF THE CASE

The Statement of the Case on pages 3 through 8 of the Petition distorts the pertinent facts. Throughout the eleven year history of this case, the petitioners have chosen to speak only of the Oklahoma conservation excise tax. The petitioners simply will not acknowledge that the conservation excise tax cannot be understood except when considered along with the Oklahoma gross production tax which it complements. Respondent submits the following as a more accurate statement of the case.

For more than 50 years before 1977 the State of Oklahoma relied upon its gross production tax on gas, a severance tax, for a significant portion of its revenues. In 1977 Oklahoma was confronted with serious revenue problems resulting from the erratic pricing of natural gas. In 1977 the wellhead prices of natural gas were ranging quixotically from 10 cents per mcf to \$1.45 per mcf. These aberrations in the wellhead prices of gas had no relation to the actual market value of gas.

The actual market value of gas in 1977 was at least \$1.00 per mcf. Much gas was being sold for even higher prices. Because the gross production tax was 7 percent of the price of gas at the wellhead, Oklahoma was receiving only 2.1 cents per mcf in revenue on gas being sold at the wellhead for 30 cents per mcf.

But purchasers of gas at such low prices were turning around and reselling that gas for \$1.00 or more per mcf. Oklahoma derived no revenue from such resale transactions.

In 1977 then Governor, now United States Senator, David Boren and the Legislature decided that the gas of Oklahoma should bear a severance tax of at least 7 cents per mcf regardless of the quixotic wellhead prices. After all, the removal of that gas from the earth was depleting a natural resource. That natural resource should be "replaced" by investing in the education of the children of Oklahoma and in other economic development.

The 1977 Oklahoma Legislature enacted the conservation excise tax in House Bill 1441, which became effective January 1, 1978. It is codified as 68 O.S. 1977 Supp., § 1107-§ 1111. (Petitioners' Appendix pages 38-42)

The conservation excise tax was designed to complement the existing 7 percent gross production tax. The conservation excise tax is 7 cents per mcf less 7% of the value of the gas with the proviso that the conservation excise tax shall not exceed one-third of the value of the gas. Thus, the conservation excise tax operates mathematically only upon gas which has a price greater than 17.5 cents per mcf and less than \$1.00 per mcf. The

complementary amounts of the conservation excise tax and the gross production tax are as follows:

<u>If the wellhead price of an mcf of gas is</u>	<u>The Oklahoma 7% gross production tax on that gas is</u>	<u>And the Oklahoma conservation excise tax on that gas is</u>
17.5 cents	1.225 cents	5.775 cents
20	1.4	5.6
30	2.1	4.9
40	2.8	4.2
50	3.5	3.5
60	4.2	2.8
70	4.9	2.1
80	5.6	1.4
90	6.3	0.7
\$1.00	7.0	-0-

Thus, the gross production tax and the conservation excise tax combine to impose a total severance tax of 7 cents per mcf upon gas sold for more than 17.5 cents per mcf and less than \$1.00 per mcf. If the gas has a wellhead price below 17.5 cents or above \$1.00 per mcf the conservation excise tax does not apply, but the 7 percent gross production tax does apply. (See finding of fact 16 at page 29 of Petitioners' Appendix.)

Contracts between producers and purchasers of gas ordinarily provide for the purchaser to reimburse the producer and royalty owner for new or increased severance taxes. However, some gas is sold under contracts which do not contain such tax reimbursement provisions. The 1977 Oklahoma Legislature enacted House Bill 1439 which became 68 O.S. 1977 Supp., § 2357, paragraph D, allowing a credit against income tax for unreimbursed

severance taxes paid in excess of 7.085% of value. (Petitioners' Appendix, pages 43 and 44) (The extra .085% was to take into account Oklahoma's other small excise tax on gas of .085 of 1% under 68 O.S. 1976 Supp., § 1102, which finances the Interstate Oil Compact Commission.) (See footnote 1 at page 29 of Petitioners' Appendix.)

Oklahoma's severance taxes on natural gas, including the gross production tax and the conservation excise tax, do not distinguish or discriminate between gas consumed in Oklahoma and gas consumed elsewhere. See findings of fact 17, 26, 27, 28 and 33 and conclusions of law 6, 8 and 9 at pages 30 through 34 of Petitioners' Appendix.

These petitioners do not "pay" any Oklahoma conservation excise tax whatsoever. These petitioners, as purchasers of gas, are not *liable* for the Oklahoma conservation excise tax. Rather, these petitioners *remit* conservation excise taxes for which producers and royalty owners are liable. These petitioners remit the tax either (1) because the gas purchase contracts obligated these petitioners as purchasers to reimburse those producers and royalty owners for such severance taxes, or (2) because these petitioners as purchasers have elected to remit such tax on behalf of the producers and royalty owners pursuant to 68 O.S. 1988 Supp., Section 1108 C. See findings of fact 18 through 24 at pages 30 and 31 of Petitioners' Appendix and conclusions of law 3 through 5 on pages 33 and 34 of Petitioners' Appendix.

Moreover, these petitioners have recovered all or nearly all of the tax they remitted. See finding of fact 25 at page 31 of Petitioners' Appendix.

Summarizing this statement of the case by respondent, the Oklahoma conservation excise tax enacted in 1977 complemented the 7 percent Oklahoma gross production tax on natural gas, to provide for a severance tax of at least 7 cents per mcf on all natural gas produced in Oklahoma. That severance tax on gas is levied and collected without regard to whether the natural gas is consumed in Oklahoma or elsewhere. There is no discrimination against interstate commerce or in favor of local interests.

RESPONDENT'S ARGUMENT FOR DENYING A WRIT OF CERTIORARI

This argument is in two parts. The first part is a response to the two arguments of the petitioners on pages 9 through 14 of the Petition. The second part is the respondent's counter argument.

RESPONSE TO PETITIONERS' ARGUMENTS

I

The Opinion of the Oklahoma Supreme Court Follows *Commonwealth Edison Co. vs. Montana* And Is Not Inconsistent with *Maryland vs. Louisiana*

The opinion of the Supreme Court of Oklahoma correctly applied the principles stated in *Commonwealth Edison Co. vs. Montana*, 453 U.S. 609 (1981). The Oklahoma opinion is not in conflict with *Maryland vs. Louisiana*, 451 U.S. 725 (1981).

The Louisiana tax which was scrutinized in *Maryland vs. Louisiana* was not a severance tax. Rather, it was a tax on the "first use" of gas produced from the Outer Continental Shelf federal lands and subsequently imported into Louisiana. Such a "first use" tax on gas produced outside Louisiana is in no aspect comparable to this Oklahoma severance tax imposed exclusively upon gas produced in Oklahoma. *Maryland vs. Louisiana* is inapposite to any issue in this case.

The first and primary issue in *Maryland vs. Louisiana* was the Supremacy Clause. The Supreme Court of the United States, in the first portion of its opinion, ruled that the " . . . plaintiffs are entitled to judgment on the pleadings that section 1303 C is invalid under the Supremacy Clause." 451 U.S. 751.

The opinion of this Court as to the Commerce Clause begins at 451 U.S. 752. This Court said that " . . . it is clear to us that the flow of gas from the (Outer Continental Shelf) wells, through processing plants in Louisiana, and through interstate pipelines to the ultimate consumers in over 30 States constitutes interstate commerce." 451 U.S. 754. This Court went on to state that " . . . we do not agree that the flow of gas from the wellhead to the consumer, even though 'interrupted' by certain events, is anything but a continual flow of gas in interstate commerce." 451 U.S. 755.

The Supreme Court of Oklahoma distinguished *Maryland vs. Louisiana* from the facts in this case because the Louisiana "first-use tax" was not comparable to this Oklahoma severance tax. See pages 15 and 16 of Petitioners' Appendix.

The Supreme Court of Oklahoma assiduously followed the directions of this Court in *Commonwealth Edison Co. vs. Montana*, 453 U.S. 609, in applying the four prong test of *Complete Auto Transit Inc. vs. Brady*, 430 U.S. 274 (1977). The Supreme Court of Oklahoma determined that the Oklahoma conservation excise tax satisfied that test. (pages 11-17 of Petitioners' Appendix)

The petitioners assert groundlessly that this Oklahoma severance tax, the conservation excise tax, "... is, in practical operation, identical to Texas' 'gathering tax' which was condemned in *Michigan-Wisconsin Pipeline Co., vs. Calvert*, 347 U.S. 157 (1954). (Page 12 of petition) Petitioners assert that "because of the exemptions and credits in Oklahoma, no producer or royalty owner must pay one penny of the tax. Only purchasers pay the tax."

These assertions of the petitioners simply are not true. These assertions are inconsistent with the facts found by the district court. The district court found (finding 18 on page 30 and conclusion 3 on page 33 of Petitioners' Appendix) that the liability for these Oklahoma severance taxes is imposed by the statutes upon the owners of that natural gas in the ground; i.e. the owners of the working interest and the owners of the royalty interest. In findings of fact 30 and 31 at page 32 of Petitioners' Appendix the district court found that this credit was extended to purchasers such as these petitioners by the 1978 amendments; and the district court found that there was no distinction or discrimination between interstate gas and intrastate gas in allowing the credit.

The Oklahoma conservation excise tax is not imposed upon purchasers such as these petitioners. If these petitioners have remitted any Oklahoma conservation excise tax, the trial court found that these petitioners did so " . . . either (1) because such (petitioners) had an obligation under their contracts with the owners of such working interest or royalty interest to reimburse such owners for severance taxes imposed upon such gas, or (2) because the (petitioners) have elected to remit such tax on behalf of the owners of working interest or royalty interest liable therefor under the election provided by the 1978 amendment to 68 O.S. Section 1108 C." See finding of fact 24 on page 31 of Petitioners' Appendix and conclusion of law 5 on page 33 of Petitioners' Appendix.

The Oklahoma conservation excise tax complements the Oklahoma gross production tax to levy at least 7 cents per mcf severance tax on natural gas produced and saved from the earth of Oklahoma. It is in no way comparable to the gathering tax condemned in *Michigan-Wisconsin Pipeline Co. vs. Calvert*, 347 U.S. 157 (1954).

The opinion of the Supreme Court of the State of Oklahoma in this case, does not conflict with *Maryland vs. Louisiana*, *supra*, nor with *Michigan-Wisconsin Pipeline Co. vs. Calvert*, *supra*.

On the contrary, the opinion of the Supreme Court of Oklahoma followed the directions of this Court in *Commonwealth Edison Co. vs. Montana*, *supra*, in applying the four prong test of *Complete Auto Transit vs. Brady*, *supra*.

The Supreme Court of Oklahoma applied the four prong test to the Oklahoma conservation excise tax and concluded properly that the Oklahoma conservation

excise tax did not impose a tax upon interstate commerce in violation of Commerce Clause.

II

The issues in this case do not justify a writ of certiorari.

These petitioners state that they have "passed on to consumers" most of this Oklahoma tax. (Page 13 of the Petition) That is not a reason for certiorari. 15 U.S.C. § 3320 of the Natural Gas Policy Act (page 37 of Petitioners' Appendix) expressly provides that state severance taxes on gas are part of the maximum lawful price which is to be passed on.

Taxes upon the severance of gas are levied upon the producer, but are ultimately recovered by the producer as a part of his cost. 15 U.S.C. § 3320 provides for that recovery of severance tax cost as part of the price of gas. The fact that this tax is recovered as part of the price of gas is irrelevant to any constitutional issues.

The petitioners seize upon the expressions of a few Oklahoma legislators as evidencing an intent to discriminate against interstate commerce in the enactment of the Oklahoma conservation excise tax. Such an intent, if it existed at all, was entirely subjective. No such intent is expressed in the statute.

This Court should not consider legislators' press statements in determining legislative intent. Legislative intent should, in the first instance, be derived from the statute itself. If the legislative intent is clear and unambiguous from the statute then jurists should deem it

unnecessary, if not improper, to go outside the statute to consider extraneous materials.

Clear and unambiguous statutes enacted by State legislatures or by Congress should be construed to mean what they say without courts resorting to press statements or committee reports. Press statements are notoriously political and polemic, often not forthright in all pertinent facts. Committee reports are usually written by unelected and faceless members of the staffs of legislative and congressional committees rather than by the representatives and senators who actually voted for the legislation which became the statute. Quite often bills are considered and enacted without the members having ever read or heard those press statements or those committee reports. It is a disservice to the majorities of Congress and to the majorities of State legislatures to attribute to them the thoughts and ideas expressed in the press statements or committee reports issued by others.

These petitioners, infected by the myopic view of William Talley, attribute malevolent intent to the Oklahoma Governor and Legislature where in fact none existed. The ultimate legislative enactment was an even-handed, nondiscriminatory severance tax.

The trial judge, after several days of receiving testimony and documentary evidence, found as a fact that the Oklahoma conservation excise tax did not discriminate between gas consumed in Oklahoma and gas consumed elsewhere.

The trial court found that some intrastate gas sold for less than \$1.00 per mcf and, therefore, bore the conservation excise tax, while some interstate gas sold for more

than \$1.00 per mcf and, therefore, did not bear the conservation excise tax. Finding of fact 17 at page 30 of Petitioners' Appendix. The trial court also found that the conservation excise tax does not distinguish or discriminate between natural gas consumed in Oklahoma and natural gas consumed elsewhere. See findings of fact 26, 27 and 28 at pages 31 and 32 of Petitioners' Appendix. The trial court found that there was no legislative intent to discriminate against interstate commerce. See finding of fact 33 at page 32 and conclusion of law 8 at page 38 of Petitioners' Appendix.

Inasmuch as the trial court found that this Oklahoma conservation excise tax does not discriminate against gas in interstate commerce in favor of gas consumed in Oklahoma, there is no substantial or important question in this case to justify the granting of a writ of certiorari.

III

Respondent's Counter Argument

This case is now more than eleven years old. It began when these same petitioners filed a complaint in the United States District Court for the Western District of Oklahoma on April 13, 1978. That District Court dismissed the complaint on April 28, 1980, for want of jurisdiction under 28 U.S.C. § 1341. That judgment was affirmed by the United States Court of Appeals for the Tenth Circuit on August 5, 1981. This Court declined to issue certiorari in No. 81-733 on December 14, 1981, 454 U.S. 1124.

Thereafter, the petitioners filed this action in the District Court of Oklahoma County, Oklahoma on January 8, 1982. This case was tried before District Judge Bryan C. Dixon, sitting without a jury, who entered judgment on December 4, 1987. The Supreme Court of Oklahoma entered its opinion on May 2, 1989.

This conservation excise tax was levied and has been collected since January 1, 1978. As stated by the petitioners the State of Oklahoma has received approximately \$130 million in revenues from this tax. Oklahoma has spent these revenues primarily to educate the children of Oklahoma. The budget of Oklahoma would be devastated if, eleven years after this tax became effective and its revenues were collected and spent, this Court should now declare that tax invalid and require Oklahoma to refund \$130 million.

These petitioners are not out the amount of this tax. On the contrary, these petitioners have been reimbursed for this tax by subsequent purchasers of the gas. See finding of fact 25 at page 31 of Petitioners' Appendix.

This case does not present any issues which constitute "special and important reasons" for granting a writ of certiorari as provided in Rule 17.1. On the contrary, the issues are the same issues which this court has already fully adjudicated in *Commonwealth Edison Co. vs. Montana*, supra.

The credit which was formerly in 68 O.S. 1977 Supp., § 2357 D, was repealed by § 23 of 1987 House Bill 1061 as of January 1, 1987. It is no longer an issue. Thus, this claim became moot after January 1, 1987.

The 1977 Oklahoma Legislature enacted a valid severance tax in House Bill 1441. The petition for a writ of certiorari should be denied.

CONCLUSION

Upon the complete facts as set forth in the Respondent's Statement of the Case, there are no special or important reasons for review and, therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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